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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 RAY A. MAXWELL,
16 Defendant.
17

CR 04-732-RSWL-1

**ORDER re: Defendant's
Motion for Compassionate
Release/Reduction of
Sentence Pursuant to 18
U.S.C. § 3582(c)(1)(A)
[1225]**

18 Currently before the Court is Defendant Ray A.
19 Maxwell's ("Defendant") Motion for Compassionate
20 Release/Reduction of Sentence Pursuant to 18 U.S.C. §
21 3582(c)(1)(A) (the "Motion") [1225].

22 Having reviewed all papers submitted pertaining to
23 the Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:**
24 the Court **DENIES** Defendant's Motion.

25 **I. BACKGROUND**

26 On March 27, 2007, Defendant pled guilty to one
27 count of conspiracy to commit bank robbery in violation
28 of 18 U.S.C. § 371; one count of attempted armed bank

1 robbery and two counts of armed bank robbery in
2 violation of 18 U.S.C. § 2113(a), (d); and one count of
3 discharging a firearm during a crime of violence in
4 violation of 18 U.S.C. § 924(c)(1)(A)(iii). See Plea
5 Agreement, ECF No. 544; Minutes of Mot. Hr'g and Change
6 of Plea Hr'g 2, ECF No. 556. This Court sentenced
7 Defendant to a term of 360 months in prison on May 5,
8 2008. J. and Probation/Commitment Order 1, ECF No. 884.
9 Defendant appealed from the judgment of conviction and
10 sentence, and the Ninth Circuit affirmed. See United
11 States v. Maxwell, 360 F. App'x 896, 898 (9th Cir.
12 2009).

13 In 2010, Defendant filed a Motion Under 28 U.S.C. §
14 2255 to Vacate, Set Aside, or Correct Sentence by a
15 Person in Federal Custody [1014], which the Court denied
16 [1046]. The Court also denied [1051] Defendant's Rule
17 59(e) Motion for Reconsideration to Alter or Amend
18 Judgment [1049]. In 2014, Defendant filed another
19 Application Under 28 U.S.C. § 2255 to Vacate, Set Aside,
20 or Correct Sentence by a Person in Federal Custody
21 [1064], which the Court dismissed [1070]. The Court
22 subsequently denied [1077] Defendant's Petition for
23 Reconsideration [1072]. In 2016, Defendant filed his
24 third § 2255 motion [1168], which the Court also denied
25 [1178]. On June 27, 2019, Defendant filed a Motion to
26 Reopen Case [1216]. The Court denied [1217] that motion
27 because it was, in substance, a successive habeas corpus
28 petition filed without pre-certification by the Ninth

1 Circuit. See Order re: Pet'r's Mot. to Reopen Case and
2 to Appoint Counsel 2:11-5:2, ECF No. 1217.

3 Defendant filed the instant Motion [1225] on July
4 29, 2020, and an Addendum to Motion [1228] on August 27,
5 2020. The government opposed [1229] on September 9,
6 2020, and Defendant filed a response and request for
7 appointment of counsel [1237] on September 22, 2020.
8 Defendant is currently serving his sentence at FCI
9 Victorville Medium I, and his projected release date is
10 March 12, 2030. United States' Resp. to Def.'s Mot.
11 ("Opp'n") 3:12-13, ECF No. 1229.

12 II. DISCUSSION

13 A. Legal Standard

14 The First Step Act, Pub. L. No. 115-391, 132 Stat.
15 5194, was enacted in 2018 and permits a defendant to
16 directly petition the district court for a sentence
17 reduction under the compassionate release statute. See
18 18 U.S.C. § 3582(c)(1)(A). 18 U.S.C. § 3582(c)(1)(A)
19 establishes a three-step process for courts to evaluate
20 a defendant's request for compassionate release. A
21 defendant must establish each of the three prongs by a
22 preponderance of the evidence. See United States v.
23 Resnik, No. CR 16-201 PA, 2020 WL 6803250, at *2 (C.D.
24 Cal. Oct. 13, 2020) (citing United States v. Sprague,
25 135 F.3d 1301, 1306-07 (9th Cir. 1998)).

26 First, a defendant must exhaust administrative
27 remedies either by "exhaust[ing] all administrative
28 rights to appeal a failure of the Bureau of Prisons to

1 bring a motion on the defendant's behalf" or by waiting
2 until thirty days have lapsed "from the receipt of such
3 a request by the warden of the defendant's facility" to
4 reduce the term of imprisonment. 18 U.S.C. §
5 3582(c)(1)(A). Second, the district court evaluates
6 whether "extraordinary and compelling reasons warrant
7 such a reduction" and whether such a reduction "is
8 consistent with applicable policy statements issued by
9 the Sentencing Commission." Id. Third, the court
10 considers the sentencing factors outlined in "section
11 3553(a) to the extent that they are applicable." Id.

12 **B. Discussion**

13 1. Request for Appointment of Counsel

14 In his response to the government's Opposition,
15 Defendant requests appointment of counsel "out of
16 necessity in the middle of this pandemic." Resp. to and
17 Appointment of Counsel 1, ECF No. 1237. Defendant
18 states that, due to a nationwide lockdown of the Bureau
19 of Prison's ("BOP") facilities, "no inmates have been
20 permitted to access the law library to research or
21 prepare legal document[s]." Id.

22 A defendant does not have a Sixth Amendment right
23 to counsel when bringing a motion under 18 U.S.C. §
24 3582(c). United States v. Townsend, 98 F.3d 510, 512-13
25 (9th Cir. 1996); see Pennsylvania v. Finley, 481 U.S.
26 551, 555 (1987) ("[T]he right to appointed counsel
27 extends to the first appeal of right, and no further.").
28 "Nor is there any statutory right to counsel in

1 connection with a motion brought under 18 U.S.C. §
2 3582(c)." U.S.A. v. Bond, No. LA CR94-00563 JAK, 2020
3 WL 4340257, at *1 (C.D. Cal. Feb. 25, 2020). Because
4 Defendant is not entitled to appointed counsel, and the
5 Motion does not entail complex issues requiring
6 assistance of counsel, Defendant's request for
7 appointment of counsel is **DENIED**.

8 2. Motion for Compassionate Release

9 a. *Exhaustion of Administrative Remedies*

10 Defendant asserts that, before filing this Motion,
11 Defendant "first tried to exhaust his administrative
12 remedy by providing his counselor . . . the appropriate
13 Request to Staff." Mot. for Compassionate
14 Release/Reduction of Sentence Pursuant to 18 U.S.C. §
15 3582(c)(1)(A) ("Mot.") 1, ECF No. 1225. The government
16 contends that Defendant has not complied with the
17 exhaustion requirement because he failed to wait the
18 requisite thirty days after filing a request. Opp'n
19 1:9-11, 11:23-24. The government alleges, without any
20 evidentiary support, that the warden received
21 Defendant's compassionate release request on July 2,
22 2020. Id. at 3:18-19. By contrast, Defendant provides
23 a copy of his compassionate release request to the
24 warden, which is dated June 23, 2020. See Inmate Req.
25 to Staff, ECF No. 1225. More than thirty days have
26 elapsed between the date of Defendant's request and the
27 filing of the Motion, and the warden has not responded
28 to his request. Mot. 1. Accordingly, in the absence of

1 evidence to the contrary, the Court assumes that
2 Defendant has satisfied the exhaustion requirement for
3 the purposes of this Order.

4 b. *Extraordinary and Compelling Reasons*

5 According to the Sentencing Commission's policy
6 statement,¹ "extraordinary and compelling reasons"
7 warranting compassionate release may include a
8 defendant's medical conditions, age and other related
9 factors, family circumstances, or "other reasons."
10 United States v. Habash, No. 1:15-cr-00286-DAD-BAM, 2020
11 WL 6381586, at *4 (E.D. Cal. Oct. 30, 2020) (quoting
12 U.S.S.G. § 1B1.13, cmt n.1 (A)-(D)). A defendant
13 seeking compassionate release based on a medical
14 condition must show that he suffers from a serious
15 condition or impairment "that substantially diminishes
16 the ability of the defendant to provide self-care within
17 the environment of a correctional facility and from
18 which he or she is not expected to recover." U.S.S.G. §
19 1B1.13 cmt n.1 (A).

20 Several courts have held that defendants' medical
21 conditions warrant compassionate release in light of the

22 ¹ Courts are split as to whether the Sentencing Commission's
23 policy statement is applicable. See United States v. Jones, No.
24 94-cr-20079-EJD-1, 2020 WL 5359636, at *5 (N.D. Cal. Aug. 27,
25 2020) (discussing that some courts have found the policy
26 statement outdated, while others have found its terms to be
27 binding). The Court need not, however, determine whether it is
28 bound by the policy statement at this juncture. Even if the
Court were permitted to consider circumstances beyond those
detailed in the policy statement, the Court does not find
extraordinary and compelling reasons here beyond those delineated
in the policy statement.

1 COVID-19 pandemic. See, e.g., United States v.
2 Rodriguez, 451 F. Supp. 3d 392, 401 (E.D. Pa. 2020)
3 (granting a motion for compassionate release based on
4 the defendant's underlying health conditions, the COVID-
5 19 pandemic, and the defendant's temporal proximity to
6 his release date); United States v. Aburto, No. 18-cr-
7 1975-GPC, 2020 WL 6802184, at *5 (S.D. Cal. Aug. 25,
8 2020) (granting the defendant's motion for compassionate
9 release "[i]n light of the heightened medical risk the
10 COVID-19 pandemic poses to [defendant] in particular").
11 But release must be based on a defendant's particular
12 susceptibility to COVID-19, not the generalized risks
13 associated with the pandemic. See Resnik, 2020 WL
14 6803250, at *3 (noting that "general concern [about
15 possible exposure to COVID-19] is shared by the public
16 at large, as well as all incarcerated individuals"); see
17 also United States v. Raia, 954 F.3d 594, 597 (3d Cir.
18 2020) ("[T]he possibility that [COVID-19] may spread to
19 a particular prison alone cannot independently justify
20 compassionate release").

21 Here, Defendant argues that extraordinary and
22 compelling reasons warrant compassionate release or a
23 reduction in sentence because "older Black men" with
24 preexisting medical conditions, like Defendant, are "at
25 the highest risk of contracting [COVID-19] and dying
26 from it." Mot. 2. The government contends that
27 Defendant has not offered any case-specific facts
28 establishing his eligibility for compassionate release

1 or provided any evidence that he will be less likely to
2 contract COVID-19 if released. Opp'n 17:5-6, 19:21-25.

3 Defendant does not identify specific medical
4 conditions in his Motion, and a review of his medical
5 records reveal none that render him at increased risk of
6 serious illness as a result of COVID-19. See generally
7 Ex. C to Opp'n ("BOP Health Problems"), ECF No. 1229-3.
8 Among Defendant's current medical conditions, only
9 hypertension is on the CDC's list of potential risk
10 factors. See People With Certain Medical Conditions,
11 CDC, [https://www.cdc.gov/coronavirus/2019-ncov/need-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)
12 [extra-precautions/people-with-medical-conditions.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)
13 (Dec. 29, 2020). But the CDC does not consider
14 hypertension as a definitive risk factor, asserting only
15 that there "might" be an increased risk. Id. Multiple
16 studies have reached different conclusions about the
17 risk associated with hypertension. Evidence Used to
18 Update the List of Underlying Medical Conditions that
19 Increase a Person's Risk of Severe Illness from COVID-
20 19, CDC, [https://www.cdc.gov/coronavirus/2019-ncov/need-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html)
21 [extra-precautions/evidence-table.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html) (Nov. 2, 2020)
22 (indicating that there is "[m]ixed [e]vidence" with
23 respect to hypertension). At this juncture, the Court
24 cannot conclude that hypertension qualifies as a
25 sufficiently serious condition that warrants
26 compassionate release,² particularly where Defendant

27 _____
28 ² Numerous courts have denied release for individuals whose
only potential COVID-19 risk factor is hypertension. See, e.g.,

1 fails to show that his essential hypertension is a
2 "serious condition" or that FCI Victorville is "unable
3 to monitor and adequately treat his medical
4 condition[]." Habash, 2020 WL 6381586, at *4 (citation
5 omitted); see also United States v. Sehorn, No. 95cr72
6 WQH, 2020 WL 7342657, at *4 (S.D. Cal. Dec. 14, 2020)
7 ("Chronic conditions, such as hypertension . . . , that
8 can be managed in prison are not a sufficient basis for
9 compassionate release.").

10 Defendant's age is also not a significant risk
11 factor that entitles him to compassionate release or a
12 reduction in sentence. While Defendant, at fifty-six
13 years old, is more susceptible to the harms of COVID-19
14 than those in younger age groups, he is not in the age
15 group at highest risk of severe outcomes. See Older
16 Adults, CDC, [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html)
17 [ncov/need-extra-precautions/older-adults.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html) (Dec. 13,

18 United States v. Johnson, No. CR19-55RSM, 2020 WL 4495981, at *3
19 (W.D. Wash. Aug. 4, 2020) (finding no extraordinary and
20 compelling reasons where the defendant, who suffered from
21 hypertension, had "no other high-risk medical conditions");
22 United States v. Upshaw, No. 1:14-CR-00256-NONE, 2020 WL 5909512,
23 at *5 (E.D. Cal. Oct. 6, 2020) ("[H]ypertension alongside the
24 risk of contracting COVID-19, without more, is not a 'serious'
25 medical condition that would qualify a prisoner for compassionate
26 release."); United States v. Ackerman, No. CR 11-740-KSM-1, 2020
27 WL 5017618, at *5 (E.D. Pa. Aug. 25, 2020) (collecting cases and
28 stating that "[w]here, as here, there is no indication that the
defendant's hypertension cannot be properly controlled via
medication or other appropriate medical care, courts routinely
hold that compassionate release is not warranted"); United States
v. Colbert, No. 99-80399, 2020 WL 3529533, at *2 (E.D. Mich. June
30, 2020) ("Hypertension, a condition that affects about 46% of
the U.S. adult population . . . [is] not [an] 'extraordinary and
compelling' condition[].").

1 2020) (stating that eighty percent of COVID-19 deaths
2 reported in the United States have involved adults
3 sixty-five years of age or older).

4 Likewise, Defendant's "race is not itself a risk
5 factor" for serious illness from the virus. United
6 States v. Scott, No. CR13-156 TSZ, 2020 WL 7043593, at
7 *1 (W.D. Wash. Dec. 1, 2020); see also Jones, 2020 WL
8 5359636, at *9 ("The Court may quickly dispose of [the
9 defendant]'s argument to the extent it is based on his
10 being African American."). Although it is true that the
11 CDC has reported higher rates of hospitalization among
12 some racial and ethnic minority groups, including non-
13 Hispanic African Americans, the CDC has not indicated
14 that those groups are inherently more susceptible to
15 COVID-19. See COVID-19 Hospitalization and Death by
16 Race/Ethnicity, CDC, [https://www.cdc.gov/coronavirus/](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html)
17 [2019-ncov/covid-data/investigations-discovery/](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html)
18 [hospitalization-death-by-race-ethnicity.html](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html) (Nov. 30,
19 2020) (noting that "[r]ace and ethnicity are risk
20 markers for other underlying conditions that affect
21 health, including socioeconomic status, access to health
22 care, and exposure to the virus related to occupation").

23 Further, the fact that Defendant has already
24 contracted COVID-19 and apparently recovered, without
25 requiring medical care for severe effects, weighs
26 against finding the existence of extraordinary and
27 compelling circumstances. See Addendum to Mot. 1; BOP
28 Health Problems 6. "[G]ranting him release arguably

1 will not provide him with the protection sought by his
2 [M]otion: relief from the risk of contracting COVID-19."
3 United States v. Alaniz, No. 15-cr-00329-DAD-BAM, 2020
4 WL 4059581, at *5 (E.D. Cal. July 20, 2020) (citation
5 omitted); see also United States v. Purry, No. 2:14-cr-
6 00332-JAD-VCF, 2020 WL 2773477, at *2 (D. Nev. May 28,
7 2020) ("The premise of [the inmates]'s request was that
8 his release would help prevent him from contracting the
9 virus. That need vanished when [the inmate] tested
10 positive for the virus."). Although Defendant argues
11 that there is no reason to assume that the BOP will be
12 able to protect him from reinfection, id., current
13 guidance indicates that reinfection is unlikely. As the
14 CDC states, "[c]ases of reinfection with COVID-19 have
15 been reported, but remain rare." Reinfection with
16 COVID-19, CDC, [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html)
17 [ncov/your-health/reinfection.html](https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html) (Oct. 27, 2020). And
18 the United States Department of Health and Human
19 Services reports that "of the millions of patients who
20 have recovered from COVID-19, which is caused by a
21 coronavirus, only a handful have been confirmed as
22 having gotten the disease again. Based on the reported
23 recurrence rate from the early stages of ongoing
24 research, the chances of becoming reinfected appear to
25 be very small." I Had COVID-19 in the Past, U.S. Dep't
26 of Health & Hum. Servs., [https://combatcovid.hhs.gov/i-](https://combatcovid.hhs.gov/i-ve-had-covid-19)
27 [ve-had-covid-19](https://combatcovid.hhs.gov/i-ve-had-covid-19) (last visited Jan. 26, 2021).
28 ///

1 Lastly, Defendant relies on the existence of
2 confirmed COVID-19 cases within BOP facilities,
3 particularly in California. See Mot. 3-4. Although FCI
4 Victorville Medium I, where Defendant is housed, is
5 currently reporting 41 inmates and 21 staff members with
6 confirmed active cases and, unfortunately, the deaths of
7 2 inmates and 1 staff member, 626 inmates and 57 staff
8 members have recovered from the virus. See COVID-19
9 Cases, Fed. Bureau of Prisons, [https://www.bop.gov/](https://www.bop.gov/coronavirus/)
10 [coronavirus/](https://www.bop.gov/coronavirus/) (last visited Jan. 28, 2021). This
11 suggests that FCI Victorville is able to provide
12 adequate medical care if Defendant experiences a rare
13 reinfection. Defendant has not demonstrated otherwise.
14 And again, Defendant's apparent recovery without
15 suffering serious illness belies his argument. While
16 the Court understands Defendant's concerns, "[g]eneral
17 concerns about possible exposure to COVID-19 do not meet
18 the criteria for extraordinary and compelling reasons
19 for a reduction in sentence set forth in the Sentencing
20 Commission's policy statement on compassionate release,
21 U.S.S.G. § 1B1.13." United States v. Eberhart, 448 F.
22 Supp. 3d 1086, 1090 (N.D. Cal. 2020).

23 Because Defendant has not carried his burden to
24 demonstrate that extraordinary and compelling reasons
25 warrant his early release, he is not entitled to
26 compassionate release or a sentence reduction under 18
27 U.S.C. § 3582(c)(1)(A). See United States v. Greenhut,
28 No. 2:18-CR-00048-CAS-1, 2020 WL 509385, at *1 (C.D.

1 Cal. Jan. 31, 2020) ("The defendant bears the initial
2 burden to put forward evidence that establishes an
3 entitlement to a sentence reduction." (citing Sprague,
4 135 F.3d at 1306-07)). Therefore, the Court need not
5 address whether such relief would be consistent with
6 consideration of the sentencing factors set forth in 18
7 U.S.C. § 3553(a) or whether Defendant may present a
8 danger to the safety of the community.

9 **III. CONCLUSION**

10 Based on the foregoing, the Court **DENIES**
11 Defendant's Motion.

12
13 **IT IS SO ORDERED.**

14
15 DATED: January 28, 2021

_____/s/ Ronald S.W. Lew

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge